

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2009

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SENATE BILL 755

Agriculture/Environment/Natural Resources Committee Substitute Adopted 5/5/09

Short Title: Promote Mitigation Banks.

(Public)

Sponsors:

Referred to:

March 24, 2009

A BILL TO BE ENTITLED

AN ACT TO PROMOTE THE USE OF COMPENSATORY MITIGATION BANKS FOR
RIPARIAN BUFFER PROTECTION AND NUTRIENT OFFSET PAYMENTS AND TO
MAKE CLARIFYING CHANGES TO THE STATUTES GOVERNING
COMPENSATORY MITIGATION FOR WETLAND AND STREAM IMPACTS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 143-214.11 reads as rewritten:

"§ 143-214.11. Ecosystem Enhancement Program: compensatory mitigation.

(a) Definition. – For purposes of this section, the term "compensatory mitigation" means the restoration, creation, enhancement, or preservation of ~~wetlands or other areas~~ jurisdictional waters required as a condition of a ~~section 404~~ permit issued by the Department or by the United States Army Corps of Engineers. For purposes of this section, "jurisdictional waters" means wetlands, streams, or other waters of the State or of the United States.

(b) ~~Department of Environment and Natural Resources~~ to Coordinate Compensatory Mitigation. – All compensatory mitigation required by permits or authorizations issued by the Department or by the United States Army Corps of Engineers ~~under 33 U.S.C. § 1344~~ shall be coordinated by the Department consistent with the basinwide ~~plans for wetlands restoration~~ restoration plans and rules developed by the Environmental Management Commission. All compensatory ~~wetlands~~ mitigation, whether performed by the Department or by permit applicants, shall be consistent with the basinwide restoration plans. All compensatory mitigation shall be consistent with rules adopted by the Commission for wetland and stream mitigation and for protection and maintenance of riparian buffers.

(c) Compensatory Mitigation Emphasis on Replacing Ecological Function Within Same River Basin. – The emphasis of compensatory mitigation is on replacing functions within the same river basin unless it is demonstrated that restoration of other areas would be more beneficial to the overall purposes of the Ecosystem Enhancement Program.

(d) Compensatory Mitigation Options Available to the North Carolina Department of Transportation. – The North Carolina Department of Transportation may satisfy compensatory ~~wetlands~~ mitigation requirements by the following actions, if those actions are consistent with the basinwide restoration plans and also meet or exceed the requirements of the Department or of the United States Army Corps of Engineers; Engineers, as applicable:

- (1) Payment of a fee established by the ~~Department~~ Commission into the Ecosystem Restoration Fund established in G.S. 143-214.12.
- (2) Donation of land to the Ecosystem Enhancement Program or to other public or private nonprofit conservation organizations as approved by the Department.



1 (3) Participation in a ~~private wetlands compensatory mitigation bank~~ bank that
2 has been approved by the United States Army Corps of Engineers, provided
3 that the Department or the United States Army Corps of Engineers, as
4 applicable, approves the use of such bank for the required compensatory
5 mitigation.

6 (4) Preparing and implementing a ~~wetlands restoration~~ compensatory mitigation
7 plan.

8 (d1) Compensatory Mitigation Options Available to Applicants Other than the North
9 Carolina Department of Transportation. – An applicant other than the North Carolina
10 Department of Transportation may satisfy compensatory ~~wetlands~~ mitigation requirements by
11 the following actions, if those actions meet or exceed the requirements of the United States
12 Army Corps of Engineers:

13 (1) Participation in a ~~private wetlands compensatory mitigation bank~~—bank if
14 the Department or the United States Army Corps of Engineers, as applicable,
15 approves the use of the bank for the required compensatory mitigation. This
16 option is only available in a hydrologic area where there is at least one
17 ~~private wetlands~~ compensatory mitigation bank that has been (i) approved by
18 the United States Army Corps of Engineers and that has available mitigation
19 credit or (ii) approved by the North Carolina Division of Water Quality for
20 resources regulated under the Neuse and Tar-Pam rules and that has
21 available mitigation credit. Engineers. For purposes of this subdivision,
22 "hydrologic area" means the eight-digit Hydrologic Unit Code where the
23 mitigation bank is located.

24 (2) Payment of a fee established by the ~~Department~~ Commission into the
25 Ecosystem Restoration Fund established in G.S. 143-214.12. —This option is
26 only available to an applicant ~~if~~ who demonstrates that the option under
27 subdivision (1) of this subsection is not ~~available as an option~~ available.

28 (3) Donation of land to the Ecosystem Enhancement Program or to other public
29 or private nonprofit conservation organizations as approved by the
30 Department.

31 (4) Preparing and implementing a ~~wetlands restoration~~ compensatory mitigation
32 plan.

33 (e) Payment Schedule. – A standardized schedule of ~~per acre~~ payment
34 amounts compensatory mitigation payment amounts shall be established by the ~~Environmental~~
35 ~~Management~~ Commission. Compensatory mitigation payments shall be made by applicants to
36 the Ecosystem Restoration Fund established in G.S. 143-214.12. The monetary payment shall
37 be based on the ecological functions and values of wetlands and streams permitted to be lost
38 and on the cost of restoring or creating wetlands and streams capable of performing the same or
39 similar functions, including directly related costs of ~~wetlands~~ wetland and stream restoration
40 planning, long-term monitoring, and maintenance of restored areas. Compensatory mitigation
41 payments for wetlands shall be calculated on a per-acre basis. Compensatory mitigation
42 payments for streams shall be calculated on a per-linear foot basis.

43 (f) Mitigation Banks. – State agencies and ~~private~~ mitigation banking companies ~~banks~~
44 shall demonstrate that adequate, dedicated financial surety exists to provide for the perpetual
45 land management and hydrological maintenance of lands acquired by the State as mitigation
46 banks, or proposed to the State as privately operated and permitted mitigation banks.

47 (g) Payment for Taxes. – A State agency acquiring land to restore, enhance, preserve, or
48 create wetlands must also pay a sum in lieu of ad valorem taxes lost by the county in
49 accordance with G.S. 146-22.3."

50 **SECTION 2.** G.S. 143-214.20 reads as rewritten:

1 **"§ 143-214.20. Riparian Buffer Protection Program: Alternatives to maintaining riparian**
2 **buffers; compensatory mitigation fees.**

3 (a) Compensatory Mitigation for Riparian Buffer Loss. – The Commission shall
4 establish a program to provide alternatives for persons who would otherwise be required to
5 maintain riparian buffers and who can demonstrate that they have attempted to avoid and
6 minimize the loss of the riparian buffer and that there is no practical alternative to the loss of
7 the buffer. This program is intended to allow these persons to perform compensatory mitigation
8 in lieu of complying with laws and rules that require that riparian buffers be protected and
9 maintained. ~~Alternatives shall include, but are not limited to:~~ All compensatory mitigation for
10 riparian buffer loss shall be consistent with rules adopted by the Commission for protection and
11 maintenance of riparian buffers.

12 (a1) Compensatory Mitigation Options Available to the North Carolina Department of
13 Transportation. – The North Carolina Department of Transportation may satisfy compensatory
14 mitigation requirements by any of the following actions:

- 15 (1) Payment of a compensatory mitigation fee into the Riparian Buffer
16 Restoration Fund. ~~Fund established in G.S. 143-214.21.~~
- 17 (2) Donation of real property or of an interest in real property to the Department,
18 another State agency, a unit of local government, or a private nonprofit
19 conservation organization if both the donee organization and the donated
20 real property or interest in real property are approved by the Department.
21 The Department may approve a donee organization only if the donee agrees
22 to maintain the real property or interest in real property as a riparian buffer.
23 The Department may approve a donation of real property or an interest in
24 real property only if the real property or interest in real property either:
- 25 a. Is a riparian buffer that will provide protection of water quality that is
26 equivalent to or greater than that provided by the riparian buffer that
27 is lost in the same river basin as the riparian buffer that is ~~lost; or~~ lost.
- 28 b. Will be used to restore, create, enhance, or maintain a riparian buffer
29 that will provide protection of water quality that is equivalent to or
30 greater than that provided by the riparian buffer that is lost in the
31 same river basin as the riparian buffer that is lost.
- 32 (3) Restoration or enhancement of an existing riparian buffer that is not
33 otherwise required to be protected, or creation of a new riparian buffer, that
34 will provide protection of water quality that is equivalent to or greater than
35 that provided by the riparian buffer that is lost in the same river basin as the
36 riparian buffer that is lost and that is approved by the Department.
- 37 (4) Construction of an alternative measure that reduces nutrient loading as well
38 or better than the riparian buffer that is lost in the same river basin as the
39 riparian buffer that is lost and that is approved by the Department.
- 40 (5) Participation in a mitigation bank if the Department has approved the bank
41 and the Department approves the use of the bank for the required
42 compensatory mitigation.

43 (a2) Compensatory Mitigation Options Available to Applicants Other than the North
44 Carolina Department of Transportation. – An applicant other than the North Carolina
45 Department of Transportation may satisfy compensatory mitigation requirements by any of the
46 following actions:

- 47 (1) Participation in a compensatory mitigation bank if the Department approves
48 the use of the bank for the required compensatory mitigation. This option is
49 only available in a hydrologic area where there is at least one compensatory
50 mitigation bank that has been approved by the Department. For purposes of

- 1 this subdivision, "hydrologic area" means the eight-digit Hydrologic Unit
2 Code where the mitigation bank is located
- 3 (2) Payment of a compensatory mitigation fee into the Riparian Buffer
4 Restoration Fund established in G.S. 143-214.21. This option is only
5 available to an applicant who demonstrates that the option under subdivision
6 (1) of this subsection is not available.
- 7 (3) Donation of real property or of an interest in real property to the Department,
8 another State agency, a unit of local government, or a private nonprofit
9 conservation organization if both the donee organization and the donated
10 real property or interest in real property are approved by the Department.
11 The Department may approve a donee organization only if the donee agrees
12 to maintain the real property or interest in real property as a riparian buffer.
13 The Department may approve a donation of real property or an interest in
14 real property only if the real property or interest in real property either:
- 15 a. Is a riparian buffer that will provide protection of water quality that is
16 equivalent to or greater than that provided by the riparian buffer that
17 is lost in the same river basin as the riparian buffer that is lost.
- 18 b. Will be used to restore, create, enhance, or maintain a riparian buffer
19 that will provide protection of water quality that is equivalent to or
20 greater than that provided by the riparian buffer that is lost in the
21 same river basin as the riparian buffer that is lost.
- 22 (4) Restoration or enhancement of an existing riparian buffer that is not
23 otherwise required to be protected, or creation of a new riparian buffer, that
24 will provide protection of water quality that is equivalent to or greater than
25 that provided by the riparian buffer that is lost in the same river basin as the
26 riparian buffer that is lost and that is approved by the Department.
- 27 (5) Construction of an alternative measure that reduces nutrient loading as well
28 or better than the riparian buffer that is lost in the same river basin as the
29 riparian buffer that is lost and that is approved by the Department.
- 30 (b) Compensatory mitigation is available for loss of a riparian buffer along an
31 intermittent stream, a perennial stream, or a perennial waterbody.
- 32 (c) The Commission shall establish a standard schedule of compensatory mitigation
33 fees. The compensatory mitigation fee schedule shall be based on the area of the riparian buffer
34 that is permitted to be lost and the cost to provide equivalent or greater protection of water
35 quality in the same river basin as that provided by the riparian buffer this is lost by:
- 36 (1) Restoration or enhancement of existing riparian buffers.
- 37 (2) Acquisition of land for and creation of new riparian buffers.
- 38 (3) Maintenance and monitoring of restored, enhanced, or created riparian
39 buffers over time.
- 40 (4) Construction of alternative measures that reduce nutrient loading.
- 41 (d) The Commission may adopt rules to implement this section."
- 42 **SECTION 3.** Section 4 of S.L. 2007-438 is repealed.
- 43 **SECTION 4.(a)** Nutrient offset credits may be purchased to partially offset the
44 nitrogen loading requirements specified in 15A NCAC 2B .0234 and 2B .0235 for the Neuse
45 River Basin and to partially offset the nitrogen and phosphorous loading requirements specified
46 in 15A NCAC 2B .0258 for the Tar-Pamlico River Basin. All nutrient offset projects authorized
47 under this section shall be consistent with rules adopted by the Environmental Management
48 Commission for implementation of nutrient management strategies in the Neuse River Basin
49 and the Tar-Pamlico River Basin and shall be located within the same eight-digit Cataloging
50 Unit, designated by the United States Geological Survey, in which the associated nutrient
51 loading takes place.

1 **SECTION 4.(b)** The North Carolina Department of Transportation may purchase
2 nutrient offset credits through either:

3 (1) Participation in a nutrient offset bank if the Department approves the use of
4 the bank for the required nutrient offsets.

5 (2) Payment of a nutrient offset fee established by the Department into the
6 Riparian Buffer Restoration Fund established in G.S. 143-214.21.

7 **SECTION 4.(c)** Applicants for nutrient offset credits other than the North Carolina
8 Department of Transportation may purchase nutrient offset credits through either:

9 (1) Participation in a nutrient offset bank that has been approved by the
10 Department if the Department approves the use of the bank for the required
11 nutrient offsets.

12 (2) Payment of a nutrient offset fee established by the Department into the
13 Riparian Buffer Restoration Fund established in G.S. 143-214.21. This
14 option is only available to an applicant who demonstrates that the option
15 under subdivision (1) of this section is not available.

16 **SECTION 5.** This act is effective when it becomes law.